

# Supreme Court of Florida

FRIDAY, JUNE 3, 2016

**CASE NO.: SC16-768**

STEVE PINCKET

vs. KENNETH J. DETZNER,  
SECRETARY

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Petitioner(s)

Respondent(s)

The petition for writ of mandamus is hereby denied. “Mandamus may not be used to establish the existence of such a right, but only to enforce a right already clearly and certainly established in the law.” Fla. League of Cities v. Smith, 607 So. 2d 397, 401 (Fla. 1992). The recently vacated judicial office of Circuit Court Judge, Tenth Judicial Circuit, Group 6, shall be filled by gubernatorial appointment. No motions for rehearing will be entertained.

LABARGA, C.J., and CANADY and POLSTON, JJ., concur.  
PARIENTE, J., concurs in result with an opinion in which QUINCE and PERRY, JJ., concur.  
LEWIS, J., concurs in result only with an opinion.

PARIENTE, J., concurring in result.

I agree that the petitioner is not entitled to mandamus relief because there is no clearly established law in his favor. The only case on point, Trotti v. Detzner, 147 So. 3d 641 (Fla. 1st DCA 2014), concluded that any vacancy, even if only one day, complied with the Florida Constitution.

However, I concur in result because I do not agree that the decision of the First District Court of Appeal is faithful to the true purpose of the Florida Constitution and the voters' preference for election of their circuit and county court judges. As Judge Padovano, dissenting from the majority's opinion in Trotti, stated, the "effect of the court's decision is to bestow upon an individual judge the power to block an election by resigning just short of the end of his or her term in office." Id. at 645-46 (Padovano, J., dissenting).

Judge Padovano opined that the Trotti majority decision was not "required as a matter of law," nor was it in keeping with this Court's opinion in Spector v. Glisson, 305 So. 2d 777 (Fla. 1974). Trotti, 147 So. 3d at 646. Judge Padovano explained that Article X, section 3, and Article V, section 11(b), of the Florida Constitution apply to actual vacancies created by resignation, or death, or inability to serve and not a resignation that is to take place "at a distant point in the future." Id.

I agree with the dissent in Trotti. If this case were before us on the merits to decide the constitutional question and we were thus not constrained by the narrow scope of mandamus relief, I would adopt the reasoning of Judge Padovano's dissent. In my view, it is most consistent with the intent of our Constitution and

our citizens that favor election of circuit and county court judges over the appointment process.

In this case, a well-respected, long serving judge decided that he wanted his judicial seat to be filled by appointment rather than by election. Specifically, the trial judge tendered his letter of resignation to the Governor on April 1, 2016, just prior to the start of the qualifying period for elections on May 2, 2016, but declared that his last day in office would not take place until late December, leaving just four working days remaining in his term.

The trial judge has made his intentions clear—he prefers his vacancy to be filled by appointment rather than election. As he stated in his letter of resignation: “it is my belief based upon years of observation that the appointment process is superior to the election process in the judicial context.”

Although individual judges may prefer the merit selection system for all judges rather than contested elections, no individual judge should be able to circumvent the intent of the provisions of the Florida Constitution that state the election of county and circuit judges “shall be preserved.” See art. V, §§ 10(b)(1) & (2), Fla. Const. In fact, after the 1998 revision to the Florida Constitution,

which allowed any county to opt out of election in favor of merit retention, not one county opted for this preference. Id.

As this Court stated in Spector, “if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature.” 305 So. 2d at 782.

Clearly there is a problem with the current constitutional provision as interpreted when the decision of whether a judicial vacancy is to be filled by general election or gubernatorial appointment rests solely with the actions of the retiring judge, rather than with the clear directive of the Constitution. As Judge Padovano expounded in his dissent in Trotti:

Finally, I fear that the precedent the court has set here, although well intended, will be abused by those who would manipulate the election process to suit their own political or philosophical objectives. Suppose, for example, that two judges in the same judicial circuit are retiring at the end of their respective terms in office. One of them likes the governor very much and the other strongly opposes the governor. The first judge could bestow the power of an appointment on the governor simply by resigning before the qualifying period but with an effective date the day before the last day of his or her term. In contrast, the second judge could block a gubernatorial appointment

simply by notifying members of the local bar that he or she does not intend to stand for re-election. Both judges would have chosen not to seek another term in office, yet one of them would have made the choice appear as though it were resignation before the end of the term.

Trotti, 147 So. 3d at 648 (Padovano, J., dissenting).

The personal preferences of individual judges, however well-motivated their intentions, should not be the basis for determining whether a vacancy exists that can either be filled by election or appointment. Although I agree with Judge Padovano’s well-reasoned dissent, the better way to resolve this issue for the future is by a declaratory judgment—or, if necessary, a clarifying constitutional amendment. Unfortunately, because the only law on point is the Trotti case, mandamus relief is not available and for that reason I reluctantly concur in the result.

QUINCE and PERRY, JJ., concur.

LEWIS, J., concurring in result only.


This Court has held that the extraordinary writ of “[m]andamus may not be used to establish the existence of such a right, but only to enforce a right already clearly and certainly established in the law.” See Fla. League of Cities v. Smith, 607 So. 2d 397, 401 (Fla. 1992). Thus, I agree with the majority that mandamus cannot lie here because there is clearly established law and a body of precedent

supports that law. I further recognize the reasons and policy concerns that lead us to where we are today.

However, if I were writing on a clean slate, I would apply Spector v. Glisson, 305 So. 2d 777 (Fla. 1974), to the facts before us. I believe that Spector more closely adheres to the letter and spirit of our Constitution. See art. V, § 10(b)(1), Fla. Const. (“The election of circuit judges shall be preserved. . . .”). Tellingly, our Constitution vests each judicial circuit the opportunity to vote to replace the election of trial judges with merit selection and retention. See id. Without fail, a majority of the citizens of every jurisdiction have voted to reject merit selection and retention of their trial judges every time such an opportunity has been presented. It therefore defies both logic and common sense that an elected judge in the last year of a term could unilaterally effect such a change by simply resigning before the statutory qualifying period with an effective date just days before the end of the term. A gubernatorial appointment in such a scenario serves no purpose because the Florida justice system sustains no negative impact when a judge resigns before the electoral process has commenced, but effective many months later, only in the last days of his or her term.

While I may even agree that the merit selection and retention of judges is far superior to the election of judges, the citizens of Florida clearly disagree. Thus, it is truly a sad day for Floridians when their trial court judges may manipulate the electoral process and prioritize their personal preferences over those espoused in the very Constitution they swore to defend. In any event, such is the state of our law and this is a Court of law, not one of personal preferences. Accordingly, I concur in the result that the majority is required to reach.

A True Copy  
Test:

  
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John A. Tomasino  
Clerk, Supreme Court



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Served:

PHILIP JOHN PADOVANO  
ADAM SCOTT TANENBAUM  
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